

March 30, 2017

**Ex Parte**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

*Re: Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143;  
*Investigation of Certain Price Cap Local Exchange Carrier Business Data Services  
Tariff Pricing Plans*, WC Docket No. 15-247; *Special Access for Price Cap Local  
Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking  
to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special  
Access Service*, RM-10593.

Dear Ms. Dortch,

On March 28, 2017, Malena Barzilai of Windstream Services, LLC (“Windstream”) and the undersigned, counsel for Windstream, along with Charles McKee of Sprint Corporation (“Sprint”) and V. Shiva Goel, counsel for Sprint, met with Jay Schwarz and Kristen Harris of the Office of Chairman Pai. We discussed the points raised in the recent *ex parte* letters filed by Sprint<sup>1</sup> and Windstream<sup>2</sup> in the above-referenced proceedings.

In particular, we discussed the clarity of the record and the Commission’s own findings on the differences between best efforts broadband services and business data services (“BDS”), the Commission’s inability to ensure just and reasonable rates for BDS customers by evaluating competition at the level of the Metropolitan Statistical Area, and the pervasive competition failures in the BDS marketplace, especially at DS1- and DS3-level capacities.

In response to a question about whether monopolist BDS rates will eventually attract enough entry to resolve competition issues in the BDS marketplace, we explained why the Commission cannot reasonably base BDS policymaking on that mistaken assumption. As recognized by the Commission and its outside economic expert, and as established by the record developed over the course of this long-running proceeding, substantial barriers to entry in the BDS marketplace prevent facilities-based competition from developing in many parts of the country. Moreover, we explained that supracompetitive wholesale rates have the effect of diminishing retail competition, thereby reducing the availability of competitive choice for both

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<sup>1</sup> Letter from Paul Margie, Counsel, Sprint, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247 & 05-25 & RM-10593 (filed Mar. 22, 2017).

<sup>2</sup> Letter from John Nakahata, Counsel, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247 & 05-25 & RM-10593 (filed Mar. 27, 2017).

individual BDS circuits and the modern connectivity solutions typically sold alongside a BDS connection. Thus, if the Commission chooses to allow incumbent local exchange carriers (“ILECs”) to engage in monopolist pricing, it could not reasonably conclude that the excessive rates paid by American businesses will ultimately self-correct, nor can it overlook the violations of the Act certain to occur in the interminable interim.

In addition, we discussed why cable hybrid fiber-coaxial (“HFC”) networks do not represent a new technology capable of providing ubiquitous BDS competition. As cable operators reiterated just this past week, they do “not have the facilities to ubiquitously offer BDS services.”<sup>3</sup> First, as the Commission already has determined,<sup>4</sup> the best efforts broadband services that cable operators typically offer over HFC are not in the same product market as BDS.<sup>5</sup> Second, because of the shared architecture of cable networks, the “limited Ethernet over HFC (‘EoHFC’) services” that cable operators provide also “are not BDS,”<sup>6</sup> and have “little potential

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<sup>3</sup> Letter from Michael H. Pryor, Counsel, Cox Communications, to Marlene H. Dortch, Secretary, FCC, at 1, WC Docket Nos. 16-143 & 05-25 (filed Mar. 24, 2017) (“Cox March 24, 2017 Ex Parte”). *See also* Letter from Steven F. Morris, Vice President & Associate General Counsel, NCTA – The Internet & Television Association, to Marlene H. Dortch, Secretary, FCC, at 1, WC Docket Nos. 16-143 & 05-25 (filed Mar. 28, 2017) (“NCTA March 28, 2017 Ex Parte”).

<sup>4</sup> *Business Data Services in an Internet Protocol Environment et al.*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 4723 ¶ 13 (2016) (“*Further Notice*”) (“BDS is distinctly different from the mass marketed ‘best efforts’ broadband Internet access services (BIAS) provided to residential end users, such as AT&T’s U-verse or Comcast’s XFINITY”).

<sup>5</sup> *See, e.g.*, Cox March 24, 2017 Ex Parte at 1 (explaining that Cox’s “best efforts services . . . are not BDS”); NCTA March 28, 2017 Ex Parte (explaining that “best efforts broadband services offered to business customers are not Business Data Services (BDS) as that term has been defined by the Commission,” because “a best efforts service provided over a shared network . . . does not provide guaranteed speed or performance levels” and “cannot meet the needs of those BDS customers that require guaranteed performance[.]”).

<sup>6</sup> Cox March 24, 2017 Ex Parte at 1-2. *See also* Letter from Samuel L. Feder, Counsel, Charter, to Marlene H. Dortch, Secretary, FCC, at 4 n.18, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed Oct. 3, 2016) (describing “the significant record evidence that Ethernet over coax is not a comparable service” to fiber-based BDS); Comments of the National Cable and Telecommunications Association at 28, WC Docket Nos. 16-143 and 05-25 (filed June 28, 2016) (explaining that EoHFC performance objectives, to the extent they are even offered at all, “often are well below the performance commitments offered with TDM or fiber-based Ethernet services”).

for significant growth”<sup>7</sup> given that their expansion would “subtract[] from the . . . shared . . . capacity” available to the cable industry’s core residential video and broadband business.<sup>8</sup>

We also discussed the Commission’s obligation under the Administrative Procedure Act to issue a notice of proposed rulemaking if it wishes to depart dramatically from the proposals in the *Further Notice* and the factual findings that have underlain more than fifteen years of Commission policymaking in this marketplace.

Finally, we discussed the importance of providing BDS customers with sufficient time to adapt to a radically altered BDS framework. If the Commission chooses to reduce or remove ILEC pricing constraints, it should adopt a transition to avoid the destabilization that would result from BDS rate increases.

Pursuant to the FCC’s rules, I have filed a copy of this notice electronically in the above-referenced proceedings. If you require any additional information, please contact the undersigned.

Sincerely,



John Nakahata  
*Counsel to Windstream*

cc: Meeting participants

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<sup>7</sup> Comments of Comcast Corporation at 31, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 10, 31 (filed June 28, 2016).

<sup>8</sup> Comments of the American Cable Association at 28, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed June 28, 2016).